U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: October 8, 1998
Case No. 97 INA 267

In the Matter of:

PAN OCEAN INTERNATIONAL, INC., *Employer,*

on behalf of

RAJU CHUGANI, *Alien.*

Appearance: M. S. Rodney, Esq., of Miami, Florida, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of RAJU CHUGANI ("Alien") by PAN OCEAN INTERNATIONAL, INC., ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at Atlanta, Georgia, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

STATEMENT OF THE CASE

On September 19, 1995, the Employer applied for alien labor certification for the permanent full time employment of the Alien as an"Administrative Assistant" in its firm, engaged in the Electronics & Telecommunications Import/Export business with the following duties:

> Assist executive with company operations including financial (bookkeeping, accounting, recordkeeeping, loan obtentention,[2] inventory control, budgetary requirements), purchasing & sales, marketing of products, negotiation of contract. Analysis of operating methods, preparation of business plans & financial reports & recommendations to improve profitability.

AF 48, box 13. (Copied verbatim without change or correction.) The position was classified as "Administrative Assistant" under DOT Occupational Code No. 169.167-010.[3] The educational requirement was completion of high school, plus four years of experience in the Job Offered or in the Related Occupation of Manager with the Described Duties. *Id*., box 14. No Other Special Requirements were stated in the Application. The position consisted of thirty-five hours per week from 9:00 AM to 5:00 PM, with no overtime. The salary offered was $454 per week. *Id*., boxes 10-12. After the job was posted and advertised, seventeen U. S. workers applied for the job, but none of them was hired. AF 35-41.

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[2] The word "obtention" that the Employer used in this application appears throughout this file. It can only be construed to be the Employer's homegrown version of the noun "obtainment." As the CO picked up Employer's novel usage and employed it in the NOF and other documents, the Panel will use "obtention" instead of "obtainment" where reference is required by this Decision and Order.

[3] 169.167-010 **ADMINISTRATIVE ASSISTANT** (any industry) alternate titles: administrative analyst; administrative officer Aids executive in staff capacity by coordinating office services, such as personnel, budget preparation and control, housekeeping, records control, and special management studies: Studies management methods in order to improve workflow, simplify reporting procedures, or implement cost reductions. Analyzes unit operating practices, such as recordkeeping systems, forms control, office layout, suggestion systems, personnel and budgetary requirements, and performance standards to create new systems or revise established procedures. Analyzes jobs to delimit position responsibilities for use in wage and salary adjustments, promotions, and evaluation of workflows. Studies methods of improving work measurements or performance standards. Coordinates collection and preparation of operating reports, such as time-and-attendance records, terminations, new hires, transfers, budget expenditures, and statistical records of performance data. Prepares reports including conclusions and recommendations for solutions of administrative problems. Issues and interprets operating policies. Reviews and answers correspondence. May assist in preparation of budget needs and annual reports of organization. May interview job applicants, conduct orientation of new employees, and plan training programs. May direct services, such as maintenance, repair, supplies, mail, and files. May compile, store, and retrieve management data, using computer. *GOE: 11.05.02 STRENGTH: S GED: R5 M3 L5 SVP: 7 DLU: 88*

Notice of Findings. On November 22, 1995, the CO's Notice of Findings ("NOF") denied the application, subject to the Employer's rebuttal, citing 20 CFR §§ 656.21(b)(5),[4] 656.21(b)(6),[5] and 656.24(b)(ii).[6]

(1) Under 20 CFR §§ 656.21(b)(6) and 656.24(b)(ii) the CO first explained that the Employer had rejected U. S. workers for other than lawful and job-related reasons. The NOF pointed to the example of the rejection of Mr. Dominguez because he lacked experience in purchasing, sales, and product marketing. This was unlawful, the CO said, adding, "The job opportunity is for an Administrative **Assistant**: someone who assists in these functions and not the actual person who performs these duties." (Emphasis as in the quoted text.) The CO observed that it is not a prevailing practice for Administrative Assistants to have experience performing marketing, purchasing, and accounting, citing as a second example the Employer's rejection of Antonio Acosta-Irizarry because he did not have four years of experience in accounting, loan obtention, sales, product marketing, inventory controls, and bookkeeping, which Administrative Assistants do not perform.[7] Having concluded that the Employer had failed to state specific lawful, job-related reasons for its rejection of U. S. workers who applied for this job, the CO added that the Employer had failed to engage in a good faith recruitment effort, explaining that it had not contacted or interviewed eight job applicants. As the Employer failed to investigate their qualifications and it rejected these candidates on the basis of their resumes, which clearly met the hiring criteria stated in its application, the CO said it failed to prove that no qualified U. S. workers were available for the position it offered. AF 31.

(2) Under 20 CFR §§ 656.21(b)(5) the CO again pointed out that the job duties required were tailored to the Alien's qualifications, and the functions that Employer had specified in its application were materially inconsistent with the prevailing United States practices regarding the work of Administrative Assistants. As the CO had noted under 20 CFR §§ 656.21(b)(6) and 656.24(b)(ii), Administrative Assistants are not marketers, accountants, or bookkeepers, "They assist in administrative functions." AF 32.

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[4] 20 CFR § 656.21(b)(5) requires the employer to document that the Job Requirements described in the Application represent the employer's actual minimum requirements for the job, and that the employer has not hired workers with less education, training or experience for jobs similar to the position offered in the Application, or that it is not feasible to hire workers with less education, training or experience than that required by employer's job offer.

[5] If U. S. workers applied for the job and were not hired, 20 CFR § 656.21(b)(6) requires the employer to prove that they were rejected solely for reasons that were lawful and job related.

[6] 20 CFR § 656.24(b)(2)(ii) provides that the Certifying Officer shall consider a U. S. worker to be able and qualified for the job offered if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as it customarily is performed by other U. S. workers similarly employed, except that, if the application involves a job opportunity as a college or university teacher or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U. S. worker must be at least as well qualified as the alien.

[7] The CO then added, "It is clear these requirements have been tailored towards the alien."

By way of rebuttal the Employer was directed to prove that its reasons for rejecting U. S. workers were lawful and job-related, that it had conducted its recruitment in good faith, that its stated hiring criteria were its minimum actual job requirements, and that its job requirements had not been tailored to meet the Alien's qualifications.

Rebuttal. On March 10, 1997, the Employer filed its rebuttal, which addressed the issues noted in the NOF. AF 06-27. The rebuttal included a statement by counsel, copies of file documents, a statement by the Employer's president, and copies of the resumes of the job applicants. Employer asserted that he had interviewed Mr. Dominguez, Ms. Alvarez, Mr. Acosta-Irizarry, Ms. Ramos, Mr. Rudd, and Mr. Bristol, and that he did not interview Ms. Ibarra and Ms. Harper because their resumes indicated that both applicants were clearly unqualified for the position. The Employer then asserted that its job description did represent its actual minimum requirements for the position, and that it had not hired workers with less education, training or experience. The Employer concluded at AF 15-17 that,

> It is extremely reasonable that the person working with (assisting) the Chief Executive of the company with company operations (financial, purchasing, sales, marketing, reports, negotiation and analysis duties) be able to perform such duties. As the executive cannot perform all these duties at the same time, we need someone to assist him by performing these duties. 'Assisting the Chief Executive' entails performing the duties. That is how he is assisted. In order to perform these duties, we believe it is not only reasonable, but necessary, that the individual have such experience.

Final Determination. On March 24, 1997, the CO issued a Final Determination denying certification. AF 04-05. After discussing the NOF and Employer's rebuttal, the CO concluded that the Employer failed to sustain its burden of proof as to its minimum job requirements and its rejection of U. S. workers. While the rebuttal alleged that the Employer had interviewed all of the U. S. applicants except two, said the CO, the Employer offered no documentary evidence to support this assertion beyond its file notes, which were seen as self-serving. As the rebuttal offered no evidence to corroborate its statement that eight of the applicants were interviewed and that the stated hiring criteria were its minimum requirements, the CO concluded that the Employer had failed to sustain its burden of proof.

Appeal. On April 17, 1997, Employer appealed and claimed error, contending that it had provided documentary evidence that it had interviewed the job applicants, that the job requirements were not tailored to the Alien., and that the Final Determination was vague and unclear.[8] AF 01-02. The Employer filed a brief on May 23, 1997.

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[8] As the Final Determination more clearly stated the reasons for denial of certification when read with the NOF, the Panel had noted but found no support in the record for Employer's contention error in the Final Determination because it was vague or otherwise inadequate.

Discussion

Burden of Proof. The text of § 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, has been incorporated into 20 CFR § 656.2(b), which provides that, "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act." [9]

Issue. While an employer may adopt any qualifications it may fancy for the workers it hires in its business, when an employer seeks to apply such hiring criteria to U. S. job seekers in the process of testing the labor market as part of its application for alien labor certification it must comply with the Act and regulations. This is particularly the case where, as in this application, the employer applies hiring criteria that conflict with the explicit prohibitions of 20 CFR §§ 656.21(b)(5) and (6). As the CO gave no weight to Employer's notes as evidence that it had interviewed eight of the applicants and had not accepted as compelling evidence the Employer's statement that the hiring criteria specified in the Applicant were its minimum requirements, the issue to determine is whether Employer's evidence that it had interviewed the job applicants and that the job requirements were not tailored to the Alien was adequate to sustain its burden of proof.

Job Interviews. The Employer objected to the CO's finding that it had "provided no documentary evidence" to rebut the statements by eight U. S. workers that it had failed to contact them for interviews. All job applicants who responded to the State Employment Security Agency questionnaire stated that the Employer did not contact them. Employer did not offer any evidence that it attempted to contact these workers by Certified Mail to offer an interview. Instead, its contrary evidence consisted entirely of notes its president wrote on the respective resumes of the applicants, both before and at the time of interviews that it alleged it conducted by telephone. Employer argued that because these notes included facts that could not have come from any source other than an interview, it must follow that the Employer was in contact with each of these applicants on whose resumes its president had written such notes.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit in the Act and regulations. **H. C. LaMarche Enterprises, Inc.**, 87 INA 607 (Oct. 27, 1988). An employer must make efforts to contact qualified U. S. applicants in a timely fashion after receiving their resumes from the

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[9] The Panel takes note of the policy expressed in § 212(a)(14) of the Immigration and Nationality Act of 1952, which was enacted to exclude aliens competing for jobs U. S. workers would fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979). To achieve this Congressional purpose the Department of Labor ("DOL") adopted regulations setting forth a number of provisions designed to ensure that the statutory preference favoring domestic workers is carried out whenever possible.

state employment security agency. Failure to make timely contact with U. S. job seekers indicates a failure to recruit in good faith. **Loma Linda Foods, Inc.**, 89 INA 289 (Nov. 26, 1991).[10] A failure to make any contact at all with the job applicants is considered an untimely contact. **Flamingo Electroplating, Inc.**, 90 INA 495 (Dec. 23, 1991); **Moore's Barbecue House, Inc.**, 89 INA 308 (Jan. 15, 1991). This case turns on the evaluation of Employer's report that it make contact by telephone with all of the job applicants that it considered possibly qualified by their resumes, which the CO weighed against the applicants' denials that Employer called them or contracted them by any other means. While Employer was directed to provide documentary proof that it conducted its recruitment effort in good faith, the Appellate File does not contain such evidence other than Employer's notes, which are cryptic, incomplete, and do not speak for themselves. **Rainbow Sound**, 94 INA 176 (Apr. 26, 1995), **Dance Trends by Blasia, Inc.**, 94 INA 310 (Apr. 24, 1995). The Panel finds it persuasive in this case that responses by eight unconnected applicants were unanimous in contradicting the Employer's assertion that it contacted them. **New Japan International, Inc.**, 93 INA 561 (Jul. 29, 1994). Based on the Appellate File we find that the evidence supported denial of certification on grounds that Employer failed to document good faith recruitment. **Culver City Meat Company, Inc.**, 93 INA 546 (Jan. 31, 1995).

Accordingly, the following order will enter.

ORDER

We hereby affirm the Certifying Officer's denial of alien labor certification.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals.

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[10] While an employer may reject an applicant whose resume reveals that he clearly lacks the minimum specified job requirements, employer has an obligation to investigate the credentials of an applicant whose credentials indicate so broad a broad range of experience, education, and training that it is reasonably possible that he is qualified for the job. **Gorchev & Gorchev Graphic Design**, 89 INA 118 (Nov. 29, 1990)(*en banc*). It is well-established, however, that fact that the resume does not list all of the requirements for the position does not excuse the employer's failure to contact an applicant. **Elf Enterprises**, 94 INA 622 (Apr. 16, 1996). Also see **BEM Systems, Inc.**, 93 INA 487 (Nov. 29, 1994); and **GE Aircraft Engines**, 89 INA 012 (Apr. 20, 1990).

Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.